

**PLAINTIFFS'
OPPOSITION TO
GOOGLE'S MOTION IN
LIMINE NUMBER 1 TO
EXCLUDE EVIDENCE
AND ARGUMENT RE:
SANCTIONS
PROCEEDINGS AND
DISCOVERY
MISCONDUCT**

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20 **UNITED STATES DISTRICT COURT**
21 **NORTHERN DISTRICT OF CALIFORNIA**

22 CHASOM BROWN, WILLIAM BYATT,
23 JEREMY DAVIS, CHRISTOPHER CASTILLO,
24 and MONIQUE TRUJILLO individually and on
behalf of all other similarly situated,

25 Plaintiffs,

26 v.

27 GOOGLE LLC,

28 Defendant.

Case No.: 4:20-cv-03664-YGR-SVK

PLAINTIFFS' OPPOSITION TO
GOOGLE'S MOTION *IN LIMINE*
NUMBER 1 TO EXCLUDE EVIDENCE
AND ARGUMENT RE: SANCTIONS
PROCEEDINGS AND DISCOVERY
MISCONDUCT

Judge: Hon. Yvonne Gonzalez Rogers

Date: November 29, 2023

Time: 9:00 a.m.

1 **I. INTRODUCTION**

2 Google's Motion *in Limine* Number 1 is overbroad and premature. It seeks to "exclude any
 3 evidence and argument regarding the sanctions orders, sanctions proceedings, or alleged discovery
 4 misconduct"—claiming these matters are "irrelevant" to the issues being tried. Mot. at 1, 4. But trial
 5 hasn't started yet. Relevance will depend in part on how Google tries the case. For example, if
 6 Google seeks to repeatedly criticize Plaintiffs for lacking evidence of "X," then it may be appropriate
 7 to allow the jury to "infer from Google's failure to disclose these data sources that they are not
 8 helpful to Google." Dkt. 898 at 8. Magistrate Judge van Keulen correctly reasoned that it was
 9 "premature" for her to decide whether Google's misconduct is relevant to the jury trial. That is for
 10 this Court to decide. And that decision should be made during trial—not three months in advance.

11 There is a better way. This Court can reserve judgment until trial begins. That is the approach
 12 other courts have taken when confronted with similar motions *in limine*, focused on sanctions-related
 13 evidence. *E.g., Darmer v. State Farm Fire and Casualty Co.*, 2022 WL 741039, at *2 (D. Minn.
 14 Mar. 11, 202) ("allow[ing] references [to sanctions] to be made in closing statements, if Darmer's
 15 misconduct comes up at trial"); *Entrata, Inc. v. Yardi Sys., Inc.*, 2019 WL 4165121, at **4–5 (D.
 16 Utah. Sept. 3, 2019) (deferring any ruling on motion *in limine* to "preclude any evidence or
 17 references to pretrial discovery conduct, disputes, or sanctions," explaining that "[t]he court will rule
 18 on the admissibility of specific items of evidence at the time they are offered at trial"). Two weeks
 19 is a long time, and a lot can happen during trial. There is no need to prejudge.

20 **II. BACKGROUND**

21 In May 2022—after the close of discovery—Magistrate Judge van Keulen sanctioned Google
 22 for not disclosing [REDACTED] private browsing detection bits, in violation of three discovery orders. Dkt.
 23 588-1. Within its logs, Google uses these detection bits to apply a [REDACTED] value to the data,
 24 thus indicating whether that data is private browsing data. *Id.* at 5. According to Magistrate Judge
 25 van Keulen, *these bits "were very clearly relevant"* (*id.* at 28) and Google "was grossly negligent in
 26 failing to turn over" this evidence. *Id.* at 43. Among other sanctions (including witness preclusion)
 27 she recommended an adverse-inference jury instruction, while clarifying that it was "premature to
 28 determine if the misconduct is relevant to issues for the jury." *Id.* at 44. She also required Google to

1 “provide Plaintiffs with a representation in writing . . . that other than the logs identified thus far as
 2 containing Incognito detection bits, ***no other such logs exist.***” Dkt. 588 at 6.

3 Then Google revealed more. After a brief investigation, Google disclosed [REDACTED] more logs that
 4 use private browsing detection bits. Dkt. 614-2 ¶ 4 & at 6–8. These logs revealed previously unknown
 5 uses of private browsing data, but one log was particularly noteworthy. Aptly named a [REDACTED] log,
 6 this log proved that Google stores private browsing data and signed-in data in the very same log. Dkt.
 7 898 at 13–14. That revelation contradicts prior representations from Google’s counsel and experts.¹

8 We don’t know how many more logs are like these ones because Google stopped looking for
 9 them. The employee in charge of its post-sanctions investigation explained in a sworn declaration
 10 that while he initially planned to search for all logs with private browsing detection bits, he later
 11 decided to conduct a far more limited investigation, focused only on the [REDACTED] then-identified bits.

12 *See Sramek Aug. 18 Decl. (Dkt. 695-4) ¶ 7 (“I understood the Court’s order required me to attest
 13 that there are no other data sources at Google in which any field is used by any team to infer
 14 Incognito browser state in any form. To provide such a declaration, multiple months-long
 15 investigations would have been required. However, I understand now that the Court seeks
 16 affirmation only for the data sources with the following [REDACTED] fields . . .”).* In any event, focusing the
 17 investigation on those [REDACTED] bits might make sense if those [REDACTED] bits are the only private browsing
 18 detection bits.

19 They are not. On December 20, 2022—nine months after the close of discovery—Google
 20 disclosed yet another private browsing detection bit: the [REDACTED] field. *See* Dkt. 898
 21 (March 2023 Sanctions Order) at 3; *see also* Dkts. 810, 816 (parties’ briefs addressing this bit).
 22 Importantly, Google did not uncover this bit through its post-sanctions investigation; rather, Google’s
 23 counsel allegedly stumbled upon it through work for the *Calhoun* case. And this bit is unique. Unlike
 24 the original [REDACTED], this one is relevant to both Class 1 and Class 2 because Google used it to detect
 25

26
 27 ¹ *See* Psounis Rep. ¶¶ 45, 47 (Dkt. 659-10) (“Google . . . maintain[s] and enforce[s] separation
 28 between . . . authenticated logs and . . . unauthenticated logs.”); *see also* 4/29/2021 Tr. 16:16–20:2
 (“[t]he most important issue here . . . is that logs are internally segregated by whether you’re logged
 into a Google account or aren’t.”).

1 private browsing for Chrome Incognito as well as non-Chrome private browsers. Dkt. 898 (March
 2 2023 Sanctions Order) at 16. We still don't know if there are other bits and corresponding logs.

3 Plaintiffs moved for additional sanctions (Dkts. 615, 656), focusing on the [redacted] new logs and
 4 also this new bit. That motion was granted in part, with Magistrate Judge van Keulen excluding
 5 additional witnesses and amending her jury instruction recommendation "to provide additional
 6 context and information about the scope of Google's discovery misconduct." Dkt. 898 at 11.

7 After the sanctions process concluded, Plaintiffs served a supplemental expert report from
 8 their technical expert, Jonathan Hochman. This report did not contain any new opinions. Instead, "the
 9 purpose of this report is to explain how the new information Google provided [the [redacted] logs and the
 10 [redacted] bit] further substantiates several opinions I already offered." Dkt. 990-1
 11 (Hochman Jun 2023 Rep. ¶ 3). This information was not available to Mr. Hochman when he prepared
 12 his reports during the expert discovery period.

13 **III. ARGUMENT**

14 It would be premature for this Court to wholesale exclude any mention of sanctions-related
 15 issues. Evidence relating to Google's discovery misconduct, including the jury instruction, may
 16 become relevant, including based on Google's approach to trial. Case in point is Google's initial
 17 deposition of Mr. Hochman. That deposition occurred before Google disclosed the
 18 [redacted] bit, which is relevant to Class 2 (as explained above). Google's lawyer criticized
 19 as "speculation" Mr. Hochman's opinion that Google can identify Class 2 members, grilling him for
 20 failing to identify any detection bit relevant to Class 2. Hochman Tr. (Ex. 1) 408:21–24. Yet as it
 21 turns out, there was such a bit; it just hadn't been disclosed yet.

22 Google employed the same tactic during its most recent deposition of Mr. Hochman. This
 23 time focused on [redacted], counsel asked if Mr. Hochman has any evidence that Google
 24 used this bit "to isolate private browsing data." Mr. Hochman responded: "That's an unknown."
 25 Hochman October 2023 Rough Tr. 76:5–7 (Ex. 2). But Plaintiffs received virtually no discovery into
 26 this bit, save for a short employee declaration that Google submitted with a motion to "deprecate" the
 27 bit—filed almost a year after the close of discovery. *See* Dkt. 810. If Google will pursue the same
 28 strategy at trial, repeatedly criticizing Plaintiffs for supposedly failing to identify evidence of "X,"

1 then the jury instruction may become warranted. It would be appropriate to allow the jury to “infer
 2 from Google’s failure to disclose these data sources that they are not helpful to Google.” Dkt. 898 at
 3 18.

4 Mr. Hochman’s opinions about Google’s post-sanctions investigatory work are also relevant.
 5 In a small portion of his report, he evaluates statements from Google engineers who worked on
 6 Google’s investigation, and he provides technical insight into how Google could have done a more
 7 thorough investigation for additional bits and logs. Hochman June 2023 Rep. ¶ 39. This testimony
 8 can “help[] the jury decide whether to draw an adverse inference—as it was instructed it could do.”
 9 *GN Netcom, Inc. v. Plantronics*, 930 F.3d 76, 86 (3d Cir. 2019) (reversing judgment and ordering a
 10 new trial where the district court excluded expert testimony about spoliation, reasoning that testimony
 11 was “undoubtedly relevant”). Mr. Hochman’s opinions are likewise “probative of whether evidence
 12 contained [in the logs] would have been unfavorable” to Google. *Zucchella v. Olympusat, Inc.*, 2023
 13 WL 2628107, at *8 (C.D. Cal. Jan. 10, 2023). Google’s cases are far afield.²

14 Moreover, if sanctions become relevant at trial, there will be no “unfair prejudice” to Google.
 15 Fed. R. Evid. 403. The key word is “unfair.” Google admits the sanctions were issued to “cure”
 16 *Plaintiffs’* prejudice. Mot. at 1. If parties could evade the impact of adverse-jury instructions by
 17 claiming unfair prejudice, there would be no reason to comply with discovery obligations. Sanctions
 18 would be toothless. *See Plantronics*, 930 F.3d at 88 (“though the [spoliation] testimony could have
 19 had some prejudicial effect, that prejudice would not have been unfair”). Finally, Plaintiffs are not
 20 seeking to “relitigate” the sanctions. Mot. at 1. If anything, Google is the party seeking to relitigate
 21 sanctions, only this time by erasing them before this Court can assess their relevance.

23

24 ² In *Pavemetrics*, the Court granted a new trial because while plaintiffs’ “statements left the jury with
 25 the impression that [defendant] had something to hide … no evidence suggests [defendant] acted
 26 improperly.” *Pavemetrics Sys., Inc. v. Tetra Tech.*, 2023 WL 1836331, at *4 (C.D. Cal. Jan. 23, 2023).
 27 Similarly, in *Alameda*, the discovery misconduct at issue was only purported, not confirmed by the
 28 court. *M.H. v. Cnty. Of Alameda*, 2015 WL 894758, at *11 (N.D. Cal. Jan. 2, 2015). Here, Judge Van
 Keulen already found that Google acted improperly. And while the court in *Edwards* precluded
 plaintiff from raising discovery disputes at trial, the sanctions there did not involve a finding or jury
 instructions that the misconduct caused prejudice. *See Edwards Lifesciences Corp. v. Meril Life
 Sciences Pvt. Ltd.*, 19-cv-06593, Dkt. 369 (N.D. Cal. Jan. 14, 2022).

1 **IV. CONCLUSION**

2 Plaintiffs respectfully ask that the Court deny Google's *Motion In Limine* No. 1.

5 Dated: October 17, 2023

Respectfully submitted,

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